(1) Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

FOSTER F. BURGESS,
Petitioner,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial "interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property."

2. Whether the remaining permissible uses of regulated property are *economically viable* when they consist solely of "personal recreational use[s]," i.e., "nature walks and fishing."

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PETITION FOR WRIT OF CERTIORARI

Foster F. Burgess respectfully petitions for a writ of certiorari to review the judgment of the Florida District Court of Appeal, First District.

OPINIONS BELOW

The order of the Florida Supreme Court denying Mr. Burgess' petition for discretionary review is unreported; it appears at Appendix A to the petition. The order of the Florida District Court of Appeal, First District, denying rehearing is unreported; it appears at Appendix B to the petition. The opinion of the Florida District Court of Appeal, First District, is reported at 772 So. 2d 540 (2000); it appears at Appendix C to the petition. The order of the Florida Circuit Court (Walton County) is unreported; it appears at Appendix D to the petition.

JURISDICTION

The opinion and judgment of the Florida District Court of Appeal, First District, were entered on July 6, 2000. *See* Petition Appendix (Pet. App.) at C–1. Mr. Burgess' timely petition for discretionary review to the Florida Supreme Court was denied on June 21, 2001. *See* Pet. App. at A–1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any

state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

When he was a young man in 1956, petitioner Foster F. Burgess, now 78 years old, acquired 166 acres of undeveloped land along the Choctawhatchee River in the Florida Panhandle. *See* Pet. App. at C–2. While the property's fair market value at that time is unknown, Mr. Burgess bought it at a county tax sale for $550. Plaintiff's Trial Exhibit (Pl. Ex.) 2. He did so, as the trial court found, "with investment in mind." Pet. App. at D–2. In 1956, "no restrictions upon the use of the property existed. In fact, the Department of Environmental Protection [respondent here] did not exist." *Id.*

For many years thereafter, Mr. Burgess "used the property occasionally for recreation, i.e., nature walks and fishing." *Id.* at C–5. In 1992, however, he judged it opportune at last to try to carry out his original intentions for the property. Thus, Mr. Burgess "had the boundary surveyed and divided the property into 26 smaller tracts" for sale as five-or-so-acre recreational campsites. *Id.*; *see also* Pl. Exs. 4-6. After receiving county approval for his preliminary plat to construct the campsites, he executed a sales agreement to sell one of the lots for $11,000. *See* Pl. Ex. 7.

Mr. Burgess then sought the necessary permits from the federal and state agencies, including respondent, that now have jurisdiction over what have come to be called "wetlands." He began by applying, with respect to a single campsite, to construct an "A-frame" camping shelter on a raised platform with accompanying dock and boardwalk, to be used (and marketed) "for overnight camping, fishing, and enjoyment of nature." Pet. App. at C–2. Respondent denied the requested permit, making clear in the process that it would never issue any permit for any

camping shelter on any campsite. *See* Pl. Ex. 1K; Trial Testimony (Tr. Test.) at 83-92. As a result of the permit denial, the aforementioned sales agreement was cancelled by the putative buyer. *See id.* at 98. Indeed, Mr. Burgess "never succeeded in selling *any* of the undeveloped acreage" he had subdivided in 1992. Pet. App. at C–4-5 (emphasis added).

After exhausting his administrative remedies, Mr. Burgess brought this inverse condemnation action against respondent, asserting claims under the Just Compensation Clause and the Florida Constitution's analogue. *See, e.g., id.* at C–3 (observing that Mr. Burgess' "takings claim is based primarily in the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)"). Initially, the trial court granted summary judgment to Mr. Burgess; however, that ruling was reversed and the case was remanded for trial. *See* 667 So. 2d 267 (Fla. Dist. Ct. App. 1995).

At trial, Mr. Burgess testified about his acquisition of the property and his unsuccessful attempts to develop and sell it. He also testified that respondent's permit denial, in addition to rendering the property commercially unusable or unsaleable, also rendered it unusable even as a personal recreational site: as a septuagenarian who has undergone several operations on his left foot, he was not physically able to camp on the property using only a tent on the ground and no shelter. *See* Tr. Test. at 95. In a "Final Judgment of Taking," the trial court found that "[t]he greater weight of the evidence establishes that [respondent's] action denied Burgess all reasonable economic use of his property." Pet. App. at D–1; *accord id.* (finding that respondent, "through its regulatory process, has left Burgess with no viable economical use of his property"). The trial court further found that "[t]he proposed use of the subject property does not constitute a nuisance, pursuant to *Lucas*." *Id.* at D–2. Consequently, the court ordered a jury trial to assess the amount of just compensation owed to Mr. Burgess. *See id.*

The Florida Court of Appeal, First District, reversed the trial court's judgment of a compensable taking, ruling against Mr. Burgess on two grounds. First, the appellate court considered "whether [respondent's] denial of the [requested] permit had the effect of depriving [Mr. Burgess] of all economically viable use of his property." *Id.* at C–5. In this regard, the court observed that Mr. Burgess had acquired the property not only for "investment" but also for "personal recreational use"; that over the years, he had "used the property occasionally for recreation, i.e., nature walks and fishing"; and that notwithstanding the effective prohibition on its development, "the property remains eminently suitable for the use for which he bought it and to which he has put it these many years." *Id.* at C–5-6. For these reasons, the court of appeal ruled that Mr. Burgess "utterly failed to demonstrate that the permit denial deprived him of all reasonable use of his land." *Id.* at C–6. In so ruling, the court specifically rejected the invitation by Mr. Burgess to "affirm the lower court's decision in this case by reading *Lucas* as a rejection of recreational use as an economically beneficial use." *Id.* at C–5.

Second, the court below dismissed Mr. Burgess' federal takings claim on the theory that in order to establish a *Lucas*-type categorical taking, he "*also* was required to demonstrate that the permit denial interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property." *Id.* at C–6 (emphasis added). In this regard, the court acknowledged that "at the time [Mr. Burgess] purchased the property, no state regulation of wetlands limited [the] use of the property"; that he did buy the land as an "investment"; and that "he believed that over time the property would appreciate in value so that he could sell it to hunters and fishermen." *Id.* at C–6-7. The court nevertheless discounted such expectations as a matter of law, because a landowner "does not have the right to gain a profit from investment in land." *Id.* The only one of Mr. Burgess' expectations that the court recognized as valid was his expectation "to use . . . the land for

personal recreational purposes over the decades," which was not "totally or even substantially thwarted by the singular permit denial." *Id.* The court denied a motion for rehearing.

The Florida Supreme Court denied Mr. Burgess' petition for discretionary review on June 21, 2001. *See* Pet. App. at A–1. A week later, this Court issued its decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). As discussed below, that decision significantly undercuts, if not outright rejects, the two grounds for the decision below. Mr. Burgess would have brought *Palazzolo* to the attention of the Florida courts, but the Florida Supreme Court's order denying his petition specifically stated that "No Motion for Rehearing will be entertained by the Court." Pet. App. at A–1.

Mr. Burgess timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

As to both questions presented, the Florida courts ruled without benefit of this Court's decision in *Palazzolo v. Rhode Island* and reached conclusions inconsistent with that decision. Therefore, consistent with its usual practice, this Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of *Palazzolo*.[1]

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[1] Typically, a grant, vacate, and remand occurs very soon after issuance of the decision that provides the basis for the order. *See, e.g., McQueen v. South Carolina Department of Health & Environmental Control*, 121 S. Ct. 2581 (2001) (granting, vacating, and remanding for further consideration in light of *Palazzolo*, decided the previous day), *discussed infra* pp. 9-9.

On the other hand, it is not extraordinary for there to be delays of several months between the decision and the order, as in the present case. In the past term alone, a number of cases fit this mold. *See, e.g., Dodge v. Graville*, 121 S. Ct. 2584 (2001) (granting, va-

(continued...)

I

IN ADDING "EXPECTATIONS" TO THE *LUCAS* ANALYSIS, THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PALAZZOLO* AND WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In *Lucas v. South Carolina Coastal Council*, this Court "found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The Court thus reaffirmed the "categorical rule that total regulatory takings *must be compensated.*" *Id.* at 1026 (emphasis added). In so ruling, the Court distinguished the "categorical formulation" reaffirmed and applied in *Lucas* itself from the more general, and noncategorical, analysis that examines "the economic impact of the regulation on the claimant and . . . the extent to which the [challenged] regulation has interfered with *distinct investment-backed expectations.*" *Id.* at 1019 n.8 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

As set forth above, the Florida District Court of Appeal held that a property owner who alleges a categorical *Lucas*-type taking must show *more* than that he was denied all economically viable use of his land. The owner is "*also* . . . required to demonstrate that [such a] denial interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property." Pet. App. at C–6 (emphasis added). In so holding, the Florida court introduced the concept of "investment-backed expectations"—associated in this Court with the kind of *non*categorical regulatory takings analysis derived

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[1] (...continued)
cating, and remanding in light of *Troxel v. Granville*, 530 U.S. 57 (2000), decided more than *one year* previously); *Rapanos v. United States*, 121 S. Ct. 2518 (2001) (granting, vacating, and remanding in light of *SWANCC v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), decided more than five months previously).

from *Penn Central*—into the analysis of a *Lucas*-type takings claim. The lower court's conflation of expectations and categorical takings cannot be reconciled with *Palazzolo* or with the decisions of the Court of Appeals for the Federal Circuit.

Even while it was still describing the procedural history of the case, *Palazzolo* distinguished between "a takings claim based on the denial of all economic use," i.e., a *Lucas* claim, and a takings claim arising from "the more general test of *Penn Central*," which test asks whether any "'reasonable investment-backed expectations . . . were affected by this regulation.'" 121 S. Ct. at 2457 (quoting *Palazzolo v. State*, 746 A.2d 707, 717 (R.I. 2000)). Subsequently, having concluded that "the case is ripe, and the date of transfer of title does not bar petitioner's takings claim," *Palazzolo* went on to consider "the merits of the takings claims." *Id.* at 2464. In affirming the state court's rejection of the petitioner's *Lucas* claim, one thing this Court did *not* consider was "expectations." That is, even though the state court held that the petitioner "had 'no reasonable investment-backed expectations,'" *id.* at 2457 (quoting 746 A.2d at 717), this Court did not address that holding in analyzing the categorical takings claim.

The fundamental incongruity of expectations and categorical takings is confirmed by *Palazzolo*'s concurring opinions. Although Justices O'Connor and Scalia each fully joined the Court's opinion, they wrote separately to discuss how the fact that property was acquired after enactment of a land-use regulation ought to factor into the expectations prong of the *Penn Central* analysis. Their respective opinions, though diverging on crucial points, *shared* the understanding that "expectations" are a concept confined to that analysis alone. Justice O'Connor thus wrote that "'investment-backed expectations' . . . are rele-

vant under *Penn Central*"; she did not add that they are relevant under *Lucas*. *Id.* at 2467 n.* (O'Connor, J., concurring).[2]

Even before *Palazzolo* was decided, the Federal Circuit reached this same conclusion after exhaustive analysis of the issue in response to the government's petition for rehearing:

> In sum, we conclude that, in accord with *Lucas*, and not inconsistent with any prior holdings of this court, when a regulatory taking, properly determined to be "categorical," is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, "reasonable investment-backed expectations" are not a proper part of the analysis, just as they are not in physical takings cases.

Palm Beach Isles Associates v. United States, 231 F.3d 1354, 1364 (Fed. Cir.), *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000); *accord Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001) ("[O]ne significant difference between a categorical taking and a non-categorical taking is that in the former case, analyzing whether compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim.").

On this important question of substantive takings law, the manifest conflict between these Federal Circuit decisions (not to mention *Palazzolo*) and the decision below warrants an out-

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[2] *See also, e.g., id.* at 2466 ("Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern *partial* [i.e., noncategorical] regulatory takings. *Under these cases*, interference with investment-backed expectations is one of a number of factors that a court must examine." (Emphasis added.)); *id.* at 2468 (Scalia, J., concurring) (distinguishing a "*Penn Central* taking" —in relation to which the law will take into account "investment-backed expectations"—and a "total taking" under *Lucas*).

right grant under Rules 10(b) and 10(c). On the other hand, it is apparent that, in its procedural posture, this case is virtually identical to *McQueen v. South Carolina Department of Health & Environmental Control*, 121 S. Ct. 2581 (2001). In that case, the Supreme Court of South Carolina had held that to establish a categorical taking under *Lucas*, a property owner must prove *not only* that "there was a denial of economically viable use of the property" *but also* that he "had distinct investment-backed expectations." *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 630 (S.C. 2000). Like Mr. Burgess after him, Mr. McQueen sought relief in this Court, presenting the question "whether an owner has suffered a taking when he proves that a regulation deprives him of all economically beneficial use of his property without also proving that it frustrates his distinct or reasonable investment-backed expectations." Petition for Writ of Certiorari at i (No. 00-285).

The day after *Palazzolo* was decided, this Court without recorded dissent granted Mr. McQueen's petition, vacated the judgment below, and remanded the case for further consideration in light of *Palazzolo*. *See McQueen*, 121 S. Ct. at 2581. In light of that action, and in light of the essential identity between the question presented in *McQueen* and the first question presented here,[3] the Court should take the very same action: grant the petition, vacate the judgment below, and remand the case for further consideration in light of *Palazzolo*.

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[3] *See supra* p. i (" 'Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial 'interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property.' ").

II

IN HOLDING THAT PERSONAL RECREATIONAL USES OF REGULATED PROPERTY ARE PER SE ECONOMICALLY VIABLE, THE DECISION BELOW CONFLICTS WITH *PALAZZOLO* AND WITH THE DECISIONS OF OTHER STATE COURTS

In *Lucas*, as in the present case, the trial court found that the government's action deprived the property of all economically viable use. *Compare* 505 U.S. at 1009 (observing that the court found that the permanent ban on construction "deprived Lucas of any reasonable economic use of [his] lots"), *with* Pet. App. at D–1 (finding that respondent's action "denied Burgess all reasonable economic use of his property"). In explaining why that deprivation demanded just compensation, *Lucas* identified the "typical[]" way that regulations "leave the owner of land without economically beneficial or productive options for its use"—namely, "by requiring land to be *left substantially in its natural state*." 505 U.S. at 1018 (emphasis added).

In dissent, Justice Blackmun strenuously challenged this conception of economic viability. He asserted that "the common agrarian conception of property limited owners to 'natural' uses of their land prior to and during much of the 18th century." *Id.* at 1059 (Blackmun, J., dissenting). More concretely, Justice Blackmun argued that Mr. Lucas could not have been deprived of all economically viable use because he could "picnic, swim, *camp in a tent*, or live on the property in a movable trailer." *Id.* at 1044 (emphasis added). He asserted, moreover, that "[s]tate courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping." *Id.* Justice Stevens, also in dissent, had similar criticism for the notion that Mr. Lucas had been denied all economically viable uses of his property: after all, he "may put his land to 'other uses'—*fishing or camping*, for example." *Id.* at 1065 (Stevens, J., dissenting) (emphasis added).

No doubt the foregoing arguments of Justices Blackmun and Stevens are reasonable ones. Indeed, in ruling that the remaining permissible uses of Mr. Burgess' property were economically viable even when they consisted solely of "personal recreational use[s]," i.e., "nature walks and fishing," Pet. App. at C–4-5, the court below seemed almost to adopt the arguments wholesale. It is worth recalling, therefore, that these arguments were made *in dissent*. That means that the *Lucas* Court necessarily *rejected* them in favor of its own, quite different, conception of economically viable use, a conception that explicitly did not include land required to be "left substantially in its natural state," as is Mr. Burgess' land. 505 U.S. at 1018.

If there was any doubt about this point after *Lucas*, it was dispelled in *Palazzolo*. Even as it affirmed the lower court's rejection of the petitioner's *Lucas*-type claim, this Court made clear that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." 121 S. Ct. at 2464. But a "token interest" is precisely what is left to Mr. Burgess. Unlike the landowner in *Palazzolo*, he is not permitted "to build a substantial residence on" his parcel. *Id.* at 2465. Nor, in contrast to *Palazzolo*, can it be said that Mr. Burgess' parcel "retains $ 200,000 in development value." *Id.* at 2464. In short, because the "personal recreational use[s]" to which Mr. Burgess is limited totally exclude the *developmental* uses that the Court has found to be at the heart of economically viable use, *see Lucas*, 505 U.S. at 1019 n.8, Mr. Burgess has truly been forced to "leave [his] property 'economically idle.'" *Palazzolo*, 121 S. Ct. at 2465.

Other state courts have reached the same conclusion. In *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. Ct. App. 1998), a special master "found the denial of the permit [to build an erosion-preventing bulkhead] left each of McQueen's [oceanfront] lots without any economically beneficial use." The court of appeals affirmed this finding, holding that Mr. McQueen "has suffered a textbook taking," because

"[t]he only use of the land available to [him] after the permit denials . . . was '*recreational, aesthetic use.*'" *Id.* (emphasis added). On this point, the state supreme court affirmed. *See* 530 S.E.2d at 631 ("It is uncontested the permit denial at issue here deprives [McQueen] of all economically viable use of his property."); *cf. supra* pp. 9-9 (discussing *McQueen*, including its fate in this Court).

Similarly, in *Steel v. Capè Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996), the court considered the economic viability of property zoned "OS" (Open Space). Permissible uses under that zoning included "general recreational uses that preserve the natural environment," along with "temporary structures for boating, swimming, fishing, hunting," and other recreational pursuits. *Id.* at 649. Notwithstanding the availability of these recreational uses—which surely exceed even what is permitted on Mr. Burgess' property—the court concluded that "the uses permitted in OS-zoned districts do not include any viable economic uses" as that term is used in *Lucas*. *Id.* The key for the court was the fact that OS zoning "permits no development." *Id.*

In light of the foregoing, the second question presented by Mr. Burgess also warrants granting, vacating, and remanding. Already in conflict with *Lucas* and with other state-court decisions, the lower court's ruling that personal recreational uses like nature walks and fishing are per se economically viable is further undermined by *Palazzolo*. As an alternative to plenary consideration, and given the obvious course of action dictated by the other question presented, it would be eminently sensible to grant the petition, vacate the judgment below, and remand this case for further consideration in light of *Palazzolo*.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: September, 2001.

Respectfully submitted,

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Counsel for Petitioner

Appendix A–1

Supreme Court of Florida

THURSDAY, JUNE 21, 2001

CASE NO.: SC01-121
Lower Tribunal No.: 1D99-1764

FOSTER F. BURGESS vs. STATE OF FLORIDA, ET AL.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

bh
Served:
HON. JON S. WHEELER, CLERK
FRANK A. SHEPHERD
MICHAEL D. JONES
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L. KATHRYN FUNCHESS
CHARLES T. "CHIP" COLLETTE
HON. LEWIS LINDSEY, JUDGE
HON. MARTHA INGLE, CLERK

Appendix B–1

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

December 20, 2000

CASE NO.: 1D99-1764
L.T. No.: 94-0008-CA

State of Florida, Et Al. v. Foster F. Burgess

Appellant / Petitioner(s), Appe

BY ORDER OF THE COURT:

Appellant's motion filed July 21, 2000 for rehearing and certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Charles T. Collette L. Kathryn Funchess, A.G.C. Michael L. Rosen

Clifton H. Gorenflo Michael D. Jones

jm

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK

Appendix C–1

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D99-1764

FOSTER F. BURGESS,
Appellee.
_____/

Opinion filed July 6, 2000.

An appeal from Circuit Court for Walton County. Lewis R. Lindsey, Judge.

Charles T. "Chip" Collette, Senior Assistant General Counsel and L. Kathryn Funchess, Assistant General Counsel, Department of Environmental Protection, Tallahassee, for Appellant.

Michael L. Rosen, of Florida Legal Foundation, Inc., Tallahassee; and Michael D. Jones, of Leffler & Associates, Winter Springs, for Appellee.

PER CURIAM.

The state Department of Environmental Protection (DEP or Department) appeals from a non-final order in an inverse

condemnation action determining that the Department's denial of a dredge and fill permit constituted an unconstitutional taking of appellee's land. We reverse.

In 1956 appellee Burgess acquired approximately 160 acres of undeveloped wetlands on the Choctawhatchee River by tax deed for $500. Appellee took no action to develop the land for almost thirty years. By that time, the river had been designated an Outstanding Florida Waterway, and the Department had long since assumed jurisdiction over Florida's wetlands. In 1992, appellee applied for a dredge and fill permit to construct on the property a 1,000 square foot wooden dock, boardwalk, and A-framed camping shelter (screened on the ends) for overnight camping, fishing, and enjoyment of nature. Because his land is accessible only by water, Burgess proposed to transport in potable water and a "port-a-potty," which would be removed from the property on each occasion by boat for disposal. DEP ultimately denied the permit after administrative hearing, and appellee did not appeal that decision. Instead, Burgess filed an inverse condemnation claim in circuit court in which he alleged that the permit denial resulted in an unconstitutional taking of his property because he had been denied all "economical, viable, or reasonable use" of the property. This court previously reversed an order of summary judgment in this case, *Burgess v. State, Dep't of Envtl. Protection*, 667 So. 2d 267 (Fla. 1st DCA 1995), and remanded for trial and consideration of several issues with regard to whether the permit denial deprived appellee of all economically beneficial use of his property. Following a bench trial, the court held that the permit denial constituted a taking for which appellee should be compensated.

Appellee's takings claim is based primarily[4] in the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which the Court announced a categorical rule applicable in rare instances to regulatory takings. In *Lucas*, a developer in South Carolina purchased for himself the two remaining undeveloped waterfront residential lots in his single-family residential development. In the two year delay before he commenced building on these lots, however, the South Carolina Coastal Council, pursuant to statute, disallowed all construction of permanent habitable structures seaward of the beach line it established. This action placed the two lots in a construction-free zone. Lucas did not challenge the state's lawful exercise of power; instead, he claimed the state's action caused the "complete extinguishment of his property's value" and constituted a compensable "total" taking. *Id.* at 1009. Importantly, because the state trial court's determination that the regulation had rendered the land valueless was not challenged, the Supreme Court expressly did not address this issue. *Id.* at 1022 fn. 9. The Court framed the issue before it as "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking" requiring just compensation. *Id.* at 1007. The Court held that in the "relatively rare" case in which the imposition of a regulation causes an owner "to sacrifice all economically beneficial uses" or "productive options" for the land's use, then the landowner has suffered a taking." *Id.* at 1018, 1019. In such cases, neither the validity of the state's regulation nor its application is at issue; the focus is on the effect of the regulation. *See MacDonald, Sommer & Frates v. County of*

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[4] Appellee also relies on *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223 (Fla. 5th DCA), review denied, 613 So. 2d 3 (1992). We reject the applicability of the case, and because we find its reasoning flawed, we decline to follow it.

Yolo, 477 U.S. 340, 348, (1986) ("The court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). Where a regulation results in the "total deprivation of beneficial use," a taking has occurred because such is "the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1016. Even when the effect of a regulation is to deprive the [**5] owner of "all economically feasible use," however, there is no taking if the owner had no right to undertake the activity under "background principles of the State's law of property and nuisance." *Id.* at 1029.

The property at issue here consists of approximately 160 acres of wetlands that are inundated by brackish waters eight to twelve months of the year. The property is accessible only by water and is surrounded by other undeveloped wetlands, some of which are owned privately but most of which are owned by the government or conservation groups. Appellee testified below that he purchased the property as an "investment" that would appreciate in value and for personal recreational use. At the time of purchase, however, appellee had no specific plan for developing the property in any way. In 1992, the same year he applied for the dredge and fill permit, appellee had the boundary surveyed and divided the property into 26 smaller tracts, but he never succeeded in selling any of the undeveloped acreage. During the thirty years following the wetlands purchase, appellee used the property occasionally for recreation, i.e., nature walks and fishing. He testified that after DEP denied the permit, the property was no longer of any use to him because it would be "impractical" for him to camp on the ground (a recreational activity which he had never previously undertaken on the property). He claimed, however, that despite the permit denial the property was worth many times more than what he paid for it.

As in *Lucas*, the propriety of DEP's permit denial is not at issue here. In contrast to *Lucas*, however, the issue at hand is

whether DEP's denial of the dredge and fill permit had the effect of depriving appellee of all economically viable use of his property. *See Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1072-73 (11th Cir. 1996) ("The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land."), cert. denied, 522 U.S. 981, (1997). The phrase "economically viable use"

> should not be read to assure an owner will be able to use property to earn a profit or to produce income. Rather, it assures an owner will be able to make some use of property that economically can be executed.

McNulty v. Town of Indialantic, 727 F.Supp. 604 (M.D. Fla. 1989). See Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (listing factors for analysis of issue of deprivation of all economically viable use). Appellee invites this court to affirm the lower court's decision in this case by reading *Lucas* as a rejection of recreational use as an economically beneficial use. *See Lucas*, 505 U.S. at 1009 fn. 2. Appellee's argument fails. As noted previously, the Court in Lucas did not address whether the regulation had deprived Lucas of all economically beneficial use of his land. Second, appellee testified that he bought the property for recreational use and has thus used it in the previous decades. It seems disingenuous at best for him now to claim that recreational use is not an economically beneficial use, and we reject the claim. His argument that the property is no longer of use to him is based on his claim that he needs an A-framed shelter for camping. This claim ignores that the property remains eminently suitable for the use for which he bought it and to which he has put it these many years. Importantly, he has been and remains free to build a 500 foot dock on his property to enhance his recreational use, and such

construction does not even require a permit from DEP. See Fla. Admin. Code R. 62-312.050. Thus, appellee utterly failed to demonstrate that the permit denial deprived him of all reasonable economic use of his land.

To establish his claim of a compensable regulatory "total" taking of his property, appellee also was required to demonstrate that the permit denial interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property, to the extent that the government should compensate him. *See Good v. U.S.*, 189 F.3d 1355, 1360-61 (Fed. Cir. 1999), cert. denied, 120 S.Ct. 1554 (2000); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1361 (Fed. Cir. 1994). It is undisputed that at the time appellee purchased the property, no state regulation of wetlands limited appellee's use of the property. This does not end the inquiry, however. Appellee bought the land as an undefined "investment," with no specific (or even general) expectation of developing or improving the property. *See Pace Resources, Inc. v. Shrewsbury Township.*, 808 F.2d 1023, 1032-33 (3d Cir.) (acknowledging that reasonable, distinct, investment-backed expectations may involve recognition that property can have value arising from partially executed plans for development but noting limiting principles that such expectations are reasonable only in light of state power to regulate in public interest and that regulatory taking occurs only where regulation has effect of near complete destruction of owner's property rights), *cert. denied*, 482 U.S. 906, (1987); *Furey v. City of Sacramento*, 592 F. Supp. 463, 469 (E.D. Cal. 1984) ("[T]he investment in land expressed as its purchase price cannot give rise to investment-backed expectations protected by the law."), *aff'd*, 780 F.2d 1448 (9th Cir. 1986). Appellee's own testimony demonstrates only that at the time of purchase he believed that over time the property would appreciate in value so that he could sell it to hunters and fishermen. A landowner, however, does not have a right to gain a profit from an investment in land, *see Andrus*

v. Allard, 444 U.S. 51, 62 L. Ed. 2d 210, (1979), and the frustration of speculative economic gain is not protected by the Takings Clause, *see U.S. v. Grand River Dam Auth.*, 363 U.S. 229, (1960). Appellee's second expressed basis for purchasing the property was for personal recreation. As explained above, appellee's expectation to use and his use of the land for personal recreational purposes over the decades has not been totally or even substantially thwarted by the singular permit denial. His desire to develop the property by building a dock with a platform containing an open air A-framed camping shelter did not materialize until 1992, and as noted above, he does not need a permit to construct a dock on his land. There is no record evidence that other landowners had built such camping shelters on adjacent land. In fact, the testimony at trial demonstrated that the extensive, remote wetlands adjacent appellee's property have remained undeveloped as has his property. See *Smith v. City of Clearwater*, 383 So. 2d 681, 685 (Fla. 2d DCA 1980) (rejecting claim that taking resulted from restrictive "aquatic lands" rezoning of Smith's wetlands property and stating while "appellants will not be able to do much with their wetlands in the face of aquatic zoning, there wasn't very much they could have done with this land without such zoning"), *review dismissed*, 403 So. 2d 407 (Fla. 1981). Appellee failed to demonstrate that he had reasonable, distinct, investment-backed expectations with which the single permit denial interfered at all.

For the foregoing reasons, we reverse the trial court's order finding that DEP's denial of a dredge and fill permit resulted in a total taking of appellee's wetlands requiring compensation. As a result, there is no need to address the other issues raised in this appeal.

MINER, BENTON and BROWNING, JJ., CONCUR.

Appendix D–1

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT IN AND
FOR WALTON COUNTY, FLORIDA

FOSTER F. BURGESS,

Plaintiff,

vs.

ER '99:187
CASE NO. 94-0008-CA

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
et al.,

Defendants.
_____/

FINAL JUDGMENT OF TAKING

Foster Burgess has filed this action against the State of Florida Department of environmental Protection challenging the constitutionality of the Public Interest Test under § 373.414, Florida Statutes, claiming damages for inverse condemnation of his property arising out of DEP's denial of his application for a dredge and fill permit and the unconstitutional interference with Burgess' privacy rights under the State of Florida Constitution. Article 23. The parties have stipulated that the sole issue for trial before the Court at the this time is Burgess' claim for inverse condemnation.

After consideration of the evidence, the arguments of counsel, and the applicable case law, it is therefore

ORDERED AND ADJUDGED that:

1. The greater weight of the evidence establishes that the Department's action denied Burgess all reasonable economic use of his property. Therefore, the Defendant's denial of Plaintiff's permit application constitutes a "taking" of the

Plaintiff's property, contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

2. In 1956, when Burgess purchased the subject property, he did so with investment in mind an no restrictions upon the use of the property existed. In fact, the Department of Environmental Protection did not exist.

3. The proposed use of the subject property does not constitute a nuisance, pursuant to Lucas v. South Carolina Coastal Council, 112 S. St. 2886 (1992).

4. It is the judgment of this Court that the DEP, through its regulatory process, has left Burgess with no viable economical use of his property for which he should be compensated at an amount to be set by a jury in a trial to be scheduled forthwith by this Court.

DONE AND ORDERED in Chambers at DeFuniak Springs, Walton County, Florida, this the 9th day of April, 1999.

LEWIS R. LINDSEY
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 19 2001
OFFICE OF THE CLERK

No. 01-477

In The

Supreme Court of the United States

FOSTER F. BURGESS,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The Florida District Court Of Appeal, First District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A WILDERNESS WETLANDS RETAINS ECONOMICALLY VIABLE USE WHEN IT HAS BEEN USED RECREATIONALLY FOR DECADES, CAN STILL BE USED FOR THE SAME PURPOSES, MAY BE IMPROVED WITH A SMALL DOCK OR BOARDWALK, AND HAS GREATLY APPRECIATED IN VALUE.

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STATEMENT OF THE CASE

The property which Petitioner claims retains no economically viable use is part of a wetlands wilderness area in the Florida Panhandle. (Tr. at 9, 18; Plaintiff's Ex. 1A at 6.) It is located within the basin of the Choctawhatchee River, designated an Outstanding Florida Water under state law. (Ex. H to Burg. Aff. ¶ 1.) Petitioner bought the property for $550 at a tax sale because he believed it would appreciate in value and be "ideal for recreation use" by hunters and fishermen. (Tr. at 72.) The property's intended use was for his own recreation or to sell to others for their recreational use. (Burg. Dep. at 66.)

Petitioner used his property for decades for boating, fishing, and nature walks. (Pet. Brief at 2; Burg. Dep. at 9.) After thirty years he decided to enhance its recreational value by constructing a roofed shelter on stilts to "be used for overnight camping, fishing, and enjoyment of the wilderness nature of the area and [its] wildlife." (Plaintiff's Ex. 1A at 6.) He sought to construct the shelter on a platform of more than 1000 square feet, and he planned to transport a "porta potty" to and from the camping shelter by boat. (Tr. at 79, 30.) No sewage or utility connections exist in this remote area, which is accessible only by boat and completely inundated eight to twelve months per year. (Tr. at 55, 143.)

The Department of Environmental Protection has indicated that Petitioner could construct a 500-foot dock without any permit and might well receive permission for other recreational structures such as a boardwalk. (Tr. at 154, 158.) However, Petitioner was denied a permit for the requested cabin on stilts, and an administrative law

judge upheld the denial for environmental reasons. (Ex. H to Burg. Aff. ¶¶ 22-24.) Rather than appealing the permit denial judicially, Petitioner brought an action for inverse condemnation.

Despite the permit denial, Petitioner believes his unimproved property is worth "many times" what he paid for it. (Burg. Dep. at 29.) The property remains suitable for boating, fishing, hunting, and ecotourism. (Tr. at 157-58.) Deer hunting occurs nearby and Petitioner has observed deer and wild hog tracks on his property. (Tr. at 21; Burg. Dep. at 9.) Although one sale fell through, (Tr. at 98), Petitioner presented no other evidence that he could not beneficially use, sell, or lease the property for boating, fishing, hunting, or other recreation. He sold a similar unimproved wetlands tract at a profit. (Burg. Dep. at 25.) Although he believes the property would be much more valuable for recreation with the desired camping shelter, (*id.* at 29), he also states some people would like to own the property simply in order to "tie up their boats and fish there." (*Id.* at 28.) A number of boaters have approached him over the years about purchasing such a tract. (*Id.* at 6.)

Florida's First District Court of Appeal determined that these facts did not establish that the property was completely valueless and no use to Petitioner. *State Dep't of Environmental Protection v. Burgess*, 772 So. 2d 540, 543 (Fla. 1st DCA 2000), *review denied*, 791 So. 2d 1095 (Fla. 2001). The state court noted that the property had greatly appreciated in value, retained the same recreational use it always had, and could be improved with a more modest recreational structure. *Id.* The court termed "disingenuous" Petitioner's claim that this property lacked any

economically viable use since it remained "eminently suitable for the use for which he bought it and to which he has put it these many years." *Id.* After reaching these conclusions the court also discussed Petitioner's investment-backed expectations. *Id.* at 543-44.

The Florida Supreme Court denied discretionary review. (Pet. Brief, App. A-1.)

REASONS FOR DENYING THE WRIT

This Court should deny review of the state appellate court's fact-specific adjudication that this particular wilderness property in the Florida Panhandle retained substantial recreational value despite denial of permission to construct a roofed camping shelter.

Certiorari review by this Court is "not a matter of right"; it is granted "only for compelling reasons." Sup. Ct. R. 10. The Court may, in its discretion, grant review of an opinion of a state court of last resort based on conflict with opinions of this Court, federal appellate courts, or other highest-level state courts. Sup. Ct. R. 10(b),(c). However, for reasons both of comity and practicality, the Court avoids unnecessary review of state judgments. *See Adams v. Robertson*, 520 U.S. 83, 90-92 (1997) (dismissing writ of certiorari as improvidently granted).

In this case, there is no "compelling reason" to review the state court's fact-specific adjudication that Petitioner retained economically viable use of his property. *See* Sup. Ct. R. 10. Nor is there any reason to address

whether investment-backed expectations are an additional requirement for a categorical regulatory taking since such review would not change the result in this case.

I. THE QUESTION WHETHER INVESTMENT-BACKED EXPECTATIONS CONSTITUTE A SEPARATE CRITERION FOR A "CATEGORICAL" REGULATORY TAKING WAS NOT SQUARELY PRESENTED IN THE PRESENT CASE.

Petitioner has asked this Court to use this case to address whether a claimant's "investment-backed expectations" are a separate criterion besides "no economically viable use" in determining whether government regulation has deprived property of all value. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-17 (1992) (addressing "categorical" takings); *see also Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (holding that considerations such as pre-existing regulatory schemes are not part of a "total wipe-out" taking analysis). However, in the present case such review would be an unnecessary interference with the state judicial system.

In cases where no categorical taking is found because the property retains substantial value, the question is not "squarely before the court" whether investment-backed expectations constitute an additional component of the

analysis. *See Palm Beach Isles*, 231 F.3d 1359 (discussing earlier federal cases).[1]

In the present case, Burgess's own brief to the state appellate court described the "principal issue on appeal" as whether his property had been denied all beneficial use. (Ans. Brief at 13.) The state court's decision turned on that issue, and any additional discussion of investment-backed expectations was unnecessary dictum. *See Palm Beach Isles*, 231 F.3d at 1359; *cf. also Street v. New York*, 394 U.S. 576, 581 (1969) (inquiring whether a question was presented to the state court "in such a manner that it was necessarily decided by" the state court).

Where this Court's intervention would not change the result, the Court would merely be issuing an advisory opinion rather than determining an actual case or controversy. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (explaining the reason for the "independent state ground" doctrine). If "resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Id.* at 730.

In the present case, resolution of the question whether investment-backed expectations constitute an additional component of a categorical taking would not affect the judgment that there is no categorical taking in this case because Mr. Burgess retains economically viable use of his property.

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[1] For the same reasons, the question was not squarely before this Court in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001) (holding no categorical taking occurred because the property retained substantial value).

II. THE FLORIDA APPELLATE COURT'S ADJUDICATION OF ECONOMICALLY VIABLE USE PRESENTS NO CONFLICT WITH *PALAZZOLO* OR ANY OTHER STATE OR FEDERAL OPINION.

Neither this Court, nor any other court, has ever promulgated a "per se" rule that recreation cannot constitute an economically viable use of property.[2] Whether a particular property retains recreational value is a matter for case-by-case adjudication. This Court has held that the question of economically viable use is predominantly a question of fact. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999).

Contrary to Petitioner's assertions, (Pet. Brief at 10-11), the *Lucas* case never addressed possible recreational uses of Mr. Lucas's property because that question was not properly raised before the Court. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 n.9 (1992) (declining to entertain an argument not raised in opposition to the petition for certiorari). However questionable might be the trial court's finding that Mr. Lucas's unimproved beachfront property was valueless, the Court "must accept the finding as entered below." *Id.* at 1033-34 (Kennedy, J., concurring).

Nor was the question of recreational value raised in the *Palazzolo* case. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2464-65 (2001) (holding the landowner was not left with a "token interest"). Whether Mr. Palazzolo's land

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[2] Although Petitioner characterizes the state court as using some sort of "per se" rule, (Pet. Brief at 10), in fact the state court engages in careful, fact-specific analysis.

would have value without his ability to construct a residence was not an issue before the Court. Moreover, the facts in *Palazzolo* were quite different from the present case: residences existed nearby, and nothing was mentioned concerning past or future recreational uses for the unimproved property. *Id.* at 2455. The record before the state court in the present case, in contrast, established genuine, substantial value for Mr. Burgess's remote land in the Florida Panhandle.

The present case is completely consistent with this Court's view that total, "categorical" takings by government regulation represent "extraordinary circumstance[s]" and "relatively rare situations." *See Lucas*, 505 U.S. at 1017-18. As the Federal Circuit has interpreted *Lucas*, a categorical taking represents "the total wipeout situation," equivalent to a physical taking, leaving the owner with nothing but "bare legal title." *Palm Beach Isles*, 231 F.3d at 1361, 1363. Neither *Lucas* nor *Palazzolo* offers any ground for this Court to interfere with the state court's fact-based adjudication that this specific case is not one of those rare instances of "total wipeout."

Petitioner tries to bolster his "conflict" argument by referring to two state-court decisions finding particular pieces of property to lack economically viable use for recreation. (Pet. Brief at 11-12.) Because both these cases rest on their own specific facts, however, there is no conflict with the state court's decision in *Burgess*.

In *McQueen*, the trial court's finding of no viable economic use was based on testimony that Mr. McQueen could do *nothing* with his lots, "including park a boat on

one," and the government's concession that any recreational value to Mr. McQueen was "kind of indirect" and "really probably not directly recreational." *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. Ct. App. 1998), *reversed on other grounds*, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, and remanded*, 121 S. Ct. 2581 (2001).

Moreover, in *McQueen* the finding of no viable economic use was not appealed to the state's highest court. *See McQueen*, 530 S.E.2d at 631 ("It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property") (emphasis added). Even if there were a conflict between the South Carolina appellate decision and the Florida appellate decision, which there is not, such conflict would not constitute "compelling reason" for review by this Court. *See* Sup. Ct. R. 10(b) (referring to conflicts between state courts "of last resort").

The remaining case cited by Petitioner (also not from a state court of last resort) arose from "unique circumstances," an "egregious factual situation" where residential property was downzoned to open space by mistake and without notice to the true owner. *Steel v. Cape Corp.*, 677 A.2d 634, 645, 650 (Md. Ct. Spec. App. 1996). The state court noted that the property "does not have natural features which prohibit development," is "virtually surrounded by" development, and is across the street from a shopping center. *Id.* at 638, 650. On these facts the court held refusal to rezone the property "constitutes an impermissible regulatory taking." *Id.* at 651 (affirming a court order to rezone the property back to residential).

McQueen and *Steel* address dramatically different facts from those in *Burgess*. Mr. Burgess's property is in a remote wetlands area completely inundated by water eight to twelve months per year. (Tr. at 55, 143.) He bought it for recreation, used it for recreation, and still wants to use it for recreation: "for overnight camping, fishing, and *enjoyment of the wilderness nature of the area and [its] wildlife.*" (Plaintiff's Ex. 1A at 6, emphasis added.) He wanted a cabin on stilts simply to enhance the existing recreational value. (*See* Burg. Dep. at 28-29.) Less intrusive improvements were feasible. (Tr. at 154, 158.) Without the requested camping shelter Petitioner's land is still "eminently suitable" for boating, fishing, hunting, and the other recreational purposes for which he bought it. *Burgess*, 772 So. 2d at 543.

In Florida, perhaps more than in any other state, a recreational use need not leave land "economically idle." (Contrast Pet. Brief at 11.) Mr. Burgess himself believes that some people would like to own the property for recreational fishing, and over the years several boaters have approached him about the property. (Burg. Dep. at 28, 6.) Although one sale fell through, the evidence does not establish inability to lease or sell the land for the same recreational purposes for which he bought the land. Petitioner has been able to sell a similar unimproved wetlands lot at a profit. (Burg. Dep. at 25.) Far from retaining only a "token interest," (Pet. Brief at 11), Petitioner's property has appreciated "many times" in value. (Burg. Dep. at 29.) On these facts there can be no doubt that recreation is an economically viable use of Petitioner's property.

The state court's consideration of the property's appreciation in value is completely consistent with opinions by the Federal Circuit analyzing economically viable use. In a case cited by Petitioner as in accord with *Palm Beach Isles*, (Pet. Brief at 8), the Federal Circuit explains as follows:

> In determining whether a taking is categorical, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986); *see Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (the fact that, despite the challenged regulatory restraint, the value of the subject property increased more than three-fold in 11 years "itself undermines Forest's contention that its property was taken").

Rith Energy, Inc. v. United States, 247 F.3d 1355, 1363 (Fed. Cir. 2001). As in *Rith*, *Florida Rock*, and *Forest Properties*, Petitioner's land retains far more than "nominal" value. *See Rith*, 247 F.3d at 1363.

No state or federal case indicates that recreation may never be an economically viable use of property. Indeed, the present case is consistent with a number of state and federal opinions indicating that recreation may constitute such a use. *E.g.*, *Wyer v. Board of Environmental Protection*, 747 A.2d 192, 193 (Me. 2000); *Darack v. Mazrimas*, No. Civ.A. 95-9659, 1996 WL 406270, at *3 (Mass. Super. Jul. 22, 1996); *Edmond v. Durfee*, C.A. No. 91-0237, 1996 WL 936873, at *5 (R.I. Super. Jan. 12, 1996); *Rybachek v. United States*, 23 Cl. Ct. 222, 225 (1991); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 608 (M.D. Fla. 1989); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 395

(1988); *Hendricks v. United States*, 14 Cl. Ct. 143, 156 (1987).

The state appellate court's judgment in *Burgess* presents no conflict with any decision by this Court or any other state or federal court. There is no compelling reason for this Court to interfere with the state court's adjudication that Petitioner's recreational property still has beneficial value.

CONCLUSION

For all the foregoing reasons the Petitioner's request for a writ of certiorari should be denied.

DATED: October 19, 2001.

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No. 01-477

In the

Supreme Court of the United States

FOSTER F. BURGESS,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, First District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial "interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property."

2. Whether the remaining permissible uses of regulated property are *economically viable* when they consist solely of "personal recreational use[s]," i.e., "nature walks and fishing."

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Foster F. Burgess respectfully files this reply to respondent's Brief in Opposition (Opp.).

ARGUMENT

Mr. Burgess presented two questions of federal takings law. He respectfully suggested that the petition be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). Without even addressing the propriety of a GVR, respondent asserts that the first question is not properly before the Court and that the conflict underlying the second question does not exist. As set forth below, both assertions are wrong.

I

CONTRARY TO RESPONDENT'S ASSERTION, THE FIRST QUESTION PRESENTED IS PROPERLY BEFORE THIS COURT

Respondent asserts that the first question presented by the petition—"Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial 'interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property' "—was "not squarely presented in the present case." Opp. at 4. This assertion is preposterous. As set forth in the petition, the court below squarely held that in order to establish a regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a property owner not only must demonstrate that he was deprived of all economically viable use of his land; he "*also* [is] required to demonstrate that the [deprivation] interfered with his reasonable, distinct, investment-backed expectations." Petition Appendix (Pet. App.) at C–6 (emphasis added) (citing *Good v.*

United States, 189 F.3d 1355, 1360-61 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994)). *See* Petition at 4.

Perhaps recognizing this point, respondent suggests that because the issue of investment-backed expectations was not the "principal issue on appeal," and because the Florida court ruled against Mr. Burgess on another ground, the above-quoted ruling on a question of federal constitutional law was therefore "unnecessary dictum," such that this Court "would merely be issuing an advisory opinion" if it were to grant relief. Opp. at 5. This reasoning is absurd. As is apparent, the state court rejected Mr. Burgess' federal takings claim for *two* reasons, both based on that court's *mis*understanding of federal takings law. *See* Pet. App. at C–5 to –6; Petition at 4-5. Under respondent's tortured logic, *both* rulings are insulated from review by this Court because, as to each ruling, one could say that the *other* ruling was an "independent . . . ground" for the decision. Opp. at 5. Indeed, under such logic, this Court would be precluded from reviewing *any case* in which a "title, right, privilege, or immunity is specially set up or claimed under the Constitution [of] . . . the United States," 28 U.S.C. § 1257(a), but is rejected on more than one *federal-law* ground.

Not only is this proposition self-evidently wrong, it cannot be reconciled with the Court's ruling in *Palazzolo v. Rhode Island*, the decision in light of which Mr. Burgess seeks a remand of the present case. As this Court described the procedural posture of the litigation, "the State Supreme Court recited *multiple* grounds for rejecting petitioner's . . . takings claim." 121 S. Ct. at 2457 (emphasis added). But because all of those grounds were based in federal law, and because the petitioner in that case challenged all of those grounds in his petition, the Court faced no barrier, jurisdictional or prudential, to granting review and resolving the federal questions. The same is true here. Contrary to respondent's insinuation, *see* Opp. at 5 (referring to the "independent state ground" doctrine), both of the

two reasons proffered for rejecting Mr. Burgess' takings claim —retention of economically viable use and lack of investment-backed expectations—were based in federal law. *See* Pet. App. at C–3 to –6 (extensively discussing *Lucas* and numerous federal cases interpreting that decision). Just like Mr. Palazzolo, Mr. Burgess has challenged each of those "multiple" federal-law rulings in his two questions presented. Accordingly, the first question presented is properly before this Court.

II

THE LOWER COURT'S HOLDING THAT PERSONAL RECREATIONAL USES OF REGULATED PROPERTY ARE PER SE ECONOMICALLY VIABLE DOES INDEED PRESENT A CONFLICT

In the present case (as in *Lucas*), the trial court found that the government's action deprived the property of all economically viable use. As observed by the court below, Mr. Burgess invited the court to affirm that finding "by reading *Lucas* as a rejection of recreational use as an economically beneficial use." Pet. App. at C–5. The court rejected that invitation, saying that petitioner's "argument fails." *Id.* Or, as the court also put it: Mr. Burgess "claim[s] that recreational use is not an economically beneficial use, and we reject the claim." *Id.*

As every respondent is wont to do, respondent here calls this ruling "fact-specific" and "fact-based." Opp. at 6 n.2, 7. Mr. Burgess submits rather that the lower court essentially held that "personal recreational use[s]," i.e., "nature walks and fishing," Pet. App. at C–4, are per se economically viable uses of property. But to the extent this holding is anything less than categorical, to the extent it is indeed "fact-specific," that is due entirely to the lower court's injection of "expectations" into the issue of economic viability. Thus, the court's conclusion that Mr. Burgess retains economically viable use of his land notwithstanding he is restricted to "personal recreational use" of it

rested in part on the fact that Mr. Burgess "bought the property for recreational use and has thus used it in the previous decades" and also that "the property remains eminently suitable for the use for which he bought it and to which he has put it these many years." *Id.* at C–5. That is, the court found it significant that he "bought the land as an undefined 'investment,' with no specific (or even general) *expectation* of developing or improving the property." *Id.* at C–6 (emphasis added).

But precisely to the extent the lower court made its holding more "fact-specific" by inquiring into Mr. Burgess' unique "expectations" to resolve his *Lucas*-type claim, the lower court issued a decision that is in conflict with *Palazzolo* and with the decisions of the Court of Appeals for the Federal Circuit. *See* Petition at 6-8. As set forth in Part I of the petition, that conflict warrants a GVR in light of *Palazzolo*, consistent with the Court's action in *McQueen v. South Carolina Department of Health & Environmental Control*, 121 S. Ct. 2581 (2001). *See* Petition at 9.

Respondent also asserts that the two state-court decisions cited by the petition as standing in conflict with the decision of the Florida court below "rest on their own specific facts." Opp. at 7. Doubtless that shibboleth is as true of those cases as any other, but it is nonetheless undeniable that the decision below could not have issued from the courts of either South Carolina or Maryland. In *McQueen v. South Carolina Coastal Council*, the court held that Mr. McQueen "suffered a textbook taking" under *Lucas*, because "[t]he only use of the land available to [him] after the permit denials . . . was '*recreational, aesthetic use*.' " 496 S.E.2d 643, 650 (S.C. Ct. App. 1998) (emphasis added), *aff'd in relevant part*, 530 S.E.2d 628, 631 (S.C. 2000). Respondent would distinguish *McQueen* on the ground that the court's "finding of no viable economic use was based on testimony that Mr. McQueen could do *nothing* with his lots." Opp. at 7. To be more accurate, the court stated that Mr. "McQueen testified that he is unable to do anything with either lot." 496

S.E.2d at 650. That necessarily meant anything *economically viable*, for it was undisputed that (just like Mr. Burgess here), Mr. McQueen could "crab or fish on his lots." *Id.* In conflict with the Florida court, however, the South Carolina court held that such personal recreational use "does not truly"—meaning economically—"benefit McQueen," so that he had "suffered a textbook taking." *Id.*

Respondent also attempts to downplay the conflict with *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996). To be sure, the property in *Steel* was "across the street from a shopping center," while Mr. Burgess' property "is in a remote wetlands area." Opp. at 8, 9. Also, *Steel* involved "residential property," while the present case involves property that is, in a broad sense, "recreational." *Id.* But these distinctions hardly make the cases "dramatically different," Opp. at 9, when one focuses on the essentials: the very same "personal recreational use[s]" that made Mr. Burgess' property economically viable in the eyes of the court below were available to the owners of the property in *Steel*. *See* 677 A.2d at 649 (observing that the permissible uses under the challenged zoning included "general recreational uses that preserve the natural environment," along with "temporary structures for boating, swimming, fishing, hunting," and other recreational pursuits). Yet despite the availability of these personal recreational uses (and more), the Maryland court held that "the uses permitted in [such zoning] districts do not include any viable economic uses" as that term is used in *Lucas*. *Id.*[*] Accordingly, the conflict is real.

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[*] Respondent devotes several paragraphs to justifying "[t]he state court's consideration of the property's appreciation in value." Opp. at 10. That would be a fascinating issue—*if* the state court had in fact given it any consideration. But the court actually did not base its rejection of Mr. Burgess' takings claim on the value of his property, appreciated or otherwise, and respondent tellingly provides no citation to the opinion below on this point.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for writ of certiorari should be granted.

DATED: November, 2001.

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